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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/746,183	12/21/2000	Fredrick K. P. Klassen	END920000102US1	2908

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EXAMINER

KADING, JOSHUA A

ART UNIT	PAPER NUMBER
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2661

DATE MAILED: 09/17/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 09/746,183	Applicant(s) KLASSEN ET AL.	
	Examiner Joshua Kading	Art Unit 2661	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 14 June 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-5 and 7-25 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 1-5, 7-10, 12, 13 and 16-25 is/are allowed.
- 6) ☒ Claim(s) 11, 14 and 15 is/are rejected.
- 7) ☒ Claim(s) 1, 5, 14, 15, 16, 23, and 25 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Objections

Claims 1, 5, 14, 15, 16, 23, and 25 are objected to because of the following informalities:

5 Claim 1, line 14; claim 16, line 14; and claim 25, line 11 state "received back and in the order said packets were transmitted." For clarity it is suggested that this be changed to --received back and are not in the order said packets were transmitted.--

 Claim 1, line 5; claim 14, line 9; claim 16, line 6; and claim 25, line 3 state "speed, each said burst". To clarify that the proceeding steps further limit the burst test
10 (which is part of the first step), "speed, each said burst" should be changed to --speed, wherein each said burst--.

 Claim 1, lines 7 and 15; claim 14, line 14; claim 16, lines 8 and 15; and claim 25, line 5, the last word "and" should be deleted as to make clearer when the last step of the method is next and when there are further steps.

15 Claim 5, lines 6 and 9; and claim 20, lines 4 and 7 state "n=1...i". For the sake of clarity, it is suggested this be changed to --n=1, 2...i--.

 Claim 15, line 5 states "said method" should be changed to --said instructions--.

 Claim 16, line 5 states "executing a a plurality". This should be changed to --executing a plurality--.

20 Claim 23, lines 1-2 states "said said transmitting". There only needs to be one "said", therefore lines 1-2 should read --said transmitting--.

 Appropriate correction is required.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

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Claims 11 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kaplan et al. (U.S. Patent 6,473,404 B1) in view of applicant's admitted prior art (AAPA).

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Regarding claim 11, Kaplan discloses "method for establishing network characteristics including an historical, current, and predicted future of states of a network for all types of network traffic, including interactive, browser, batch, and realtime traffic, comprising the steps of:

transmitting probative packets into said network (col. 6, lines 15-21)...;

15

measuring transit times of said probative packets (col. 6, lines 15-21);

and responsive to said transit times, determining a streaming speed of said network (col. 5, lines 57-60 or equation 2)."

Kaplan lacks "...said packets including echoed and non-echoed packets, of like and differing lengths, of like and differing network priority, individually and in bursts..."

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However, applicant's admitted prior art discloses "...said packets including echoed and non-echoed packets, of like and differing lengths, of like and differing network priority, individually and in bursts (specification, page 6, lines 8-20)..."

It would have been obvious to one with ordinary skill in the art at the time of invention to include the different packet types with the rest of the method for the purpose of having different testing schemes. The motivation being to compare results of each scheme and determine a more realistic value for the network speed.

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Claim 15 has identical limitations as those in claim 11. Therefore, all the limitations of claim 15 that are in common with claim 11 are rejected for the same reasons as in claim 11. However, claim 11, and thus Kaplan and AAPA, lack that the method is represented on "a program storage device readable by a machine, tangibly
10 embodying a program of instructions executable by a machine for evaluating characteristics of a network". Although Kaplan and AAPA do not explicitly disclose a computer readable medium having a computer program to execute the method, it would have been obvious to one with ordinary skill in the art to implement the method using a computer program. The motivation being that to implement a method based in a
15 communications network, a computer program is the most efficient and feasible way of doing so.

Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kaplan et al.

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Regarding claim 14, Kaplan discloses "a burst test... said burst test including

determining a time of receipt of each said packets by said receiver (col. 6, lines 15-21); and

Kaplan lacks “a computer useable medium having computer readable program code means embodied therein...to effect executing” the burst test. Although Kaplan does not explicitly disclose a computer useable medium having a computer code to execute the burst test, it would have been obvious to one with ordinary skill in the art to implement the burst test using a computer program. The motivation being that to implement network test, such as a burst test, a computer program is the most efficient and feasible way of doing so.

15 **Allowable Subject Matter**

The claim objections from the previous Office Action are withdrawn in light of the current amendments.

The 35 U.S.C. 112 first paragraph rejection from the previous Office Action for claim 8 is withdrawn in light of the Remarks filed 14 June 2004, page 23, the section regarding claim 8 rejection.

Provided the objections to claims 1, 5, 16, 23, and 25 are overcome, the following is a statement of reasons for the indication of allowable subject matter:

Claims 12 and 13 are allowable because the prior art of record fails to teach, in combination with other claim limitations, “determining that frames of said packets are received in sequence and without retransmission, and an elapsed time between first through last frames of said packets”.

Response to Arguments

Applicant's arguments filed 14 June 2004 have been fully considered but they are not persuasive. Regarding the use of the Kaplan et al. reference for all rejected claims

applicant argues that Kaplan does not read on applicant's invention because it is too general and does not adequately disclose certain features of applicant's invention.

Some examples include "Kaplan does not analyze the ping's round trip time into component parts", Kaplan fails to take into account that the hop speed will double for file

5. transfers across multiple hop networks as in applicant's invention, and Kaplan does makes "no analysis of why a ping took more or less time along one path than another".

The examiner respectfully disagrees.

- Although Kaplan may or may not disclose applicant's invention as described above and what is in the specification, this does not matter because these limitations
10 are not listed or disclosed in applicant's claims. Only the claims are examined during prosecution unless the specification must be relied upon to infer more clearly what applicant's invention is. However, applicant's claims do not do this, they merely consist of a broader interpretation of applicant's invention. There is no requirement on the examiner to read the specification into the claims on understandable, broad claims.
15 Therefore, it is maintained that Kaplan reads on the corresponding limitations of applicant's claimed invention.

- Any inquiry concerning this communication or earlier communications from the examiner should be directed to Joshua Kading whose telephone number is (571) 272-
20 3070. The examiner can normally be reached on M-F: 8:30AM-5PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kenneth Vanderpuye can be reached on (571) 272-3078. The fax phone

number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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Joshua Kading
Examiner
Art Unit 2661

September 13, 2004



KENNETH VANDERPUYE
PRIMARY EXAMINER